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In The

Supreme Court of the United States

October Term, 1971

No. 71- 71-1151

ALOIS PETER WARREN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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October Term, 1971

No. 71-

ALOIS PETER WARREN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, ALOIS PETER WARREN (M.D., D.M.D., D.D.S.), respectfully prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the order of that Court rendered January 5, 1972, affirming a judgment of the United States District Court for the Southern District of New York (Motley, D. J.), convicting him of violating 21 U.S.C. §§321, 331(q)(2), 333 and 360a(b) (Supp. V 1969) relating to dangerous drugs.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is reprinted as an appendix to this petition. A petition for rehearing was denied on February 8, 1972, without formal opinion but a motion in the alternative for a stay of mandate pending certiorari was granted (see appendix).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Court of Appeals for the Second Circuit denied a motion for rehearing on the 8th of February, 1972 (see appendix).

Questions Presented

1. Whether a medical doctor, such as Petitioner, may be convicted at all of violating the statutes herein since he was exempt from the statutory prohibition against selling or disposing of amphetamines "in the ordinary and authorized course of his business [or] profession..." (21 U.S.C. §360a(b) (Supp. V 1969)?

2. Whether evidence seized by narcotics agents from Petitioner's medical offices should have been suppressed because they obtained WARREN's "consent" to a search and seizure beyond the scope of a search warrant, in the absence of counsel, by having him execute a "voluntary surrender of narcotics privileges"?

3. Whether a District Judge, as was done in the case at bar, may sentence a first offender forthwith without seeing any presentence or probation report and without affording an opportunity to make motions addressed to the conviction (Rule 32(c) F.R.Crim.P.)?

4. Whether the five year sentence and $10,000 fine imposed upon Petitioner, a 65 year old doctor and dentist, was cruel and unusual punishment and violative of due process in view of the Trial Court's refusal to await a presentence report and direction for immediate incarceration?

5. Whether the conviction herein under 21 U.S.C. 331(q)(2) and 333 should have been denominated a misdemeanor rather than a felony?

6. Whether 21 U.S.C. 360a(d), allegedly requiring a doctor to keep certain records as to the acquisition and disposition of amphetamines, permits the seizure of such records without a Court order and without probable cause, as was done in the case at bar? (See conflict between HILL v. PHILPOTT, 445 F.2d 144 [7 Cir. 1971], cert. denied, _____ U.S. _____, 10 Cr. L. 4094 [1971] and the case at bar). Cf: MARCHETTI v. UNITED STATES, 390 U.S. 39.

Constitutional and Statutory Provisions Involved

The Fourth, Fifth, Sixth and Eighth Amendments of the United States Constitution, as well as 21 U.S.C. §§321, 331(q)(2), 333, and 360a(b) (Supp. V 1969) are herein involved.

Statement of the Case

The Petitioner herein is a 65 year old medical doctor holding degrees of Medical Doctor, Doctor of Medical Dentistry, and Doctor of Dental Surgery. He had never previously been in conflict with the law. In addition, he had been a victim of Nazi persecution and at one time had been sentenced to death by that Government and it is probably a miracle that he survived to emigrate to this county.

Dr. Warren was a duly licensed physician as well as a duly licensed dentist and doctor of medical dentistry, practicing in New York City and was licensed to administer depressant or stimulant drugs while acting in his professional capacity. The Government maintained that Dr. Warren had dispensed drugs for economic motivation rather than treatment given in the course of a physician-patient relationship.

Briefly, the Government adduced testimony from several special agents from the Bureau of Narcotics and Dangerous Drugs. One of these agents, Richard Dreiwitz, acting in an undercover capacity, was introduced to Petitioner in November 1970 by another patient.

Dreiwitz declared that he needed a two week supply of a good quality methamphetamine. Dr. Warren had a course of treatment for certain ailments of which Dreiwitz complained, that combined methamphetamine with vitamins and it was a mixture of these elements that was prescribed and given to Dreiwitz. There were no pure methamphetamines dispensed to him.

About two weeks later, Dreiwitz bought another quantity of amphetamines from Dr. Warren's assistant, Patricia Meade, who was also indicted but whose trial was severed.

On his third visit, the Court of Appeals found that Dreiwitz told the doctor that he did not need the vitamins as he only took the drug to help his performance as an alleged musician. He received additional quantities at that time. It should be noted that these drugs were always dispensed in the doctor's office and there was nothing clandestine about the relationship.

Less than a week later, Dreiwitz telephoned Dr. Warren and asked for some additional amphetamines.

Agent Robert Brown at one point, picked up 30 cc. of the drug on behalf of his "friend" Dreiwitz.

Warren was indicted on January 26, 1971, and was arrested the next day in his office, at which time the agents produced a search warrant which permitted the seizure of certain amphetamines but did not authorize the seizure of patients records or other drugs. The agents unconstitutionally enlarged the permissible scope of their search and seizure by compelling Dr. Warren to execute a form they brought with them known as "voluntary surrender of narcotic privileges".

The voluntary surrender form which the agents had previously prepared or obtained from their

office, was thrust upon WARREN at the time of his arrest and, despite the fact that he was unsophisticated in matters legal and had been a victim of Nazi persecution (and, therefore, frightened of police), they insisted that he sign this form. The form is reproduced under Point I.

It is significant that the agents had a search warrant which, however, limited the scope of their search of amphetamines and certainly did not include all narcotics or patient cards. Once this so-called "voluntary surrender of narcotic privileges" form was executed, the agents acted as if they had a "writ of assistance" and conducted a massive indiscriminate search of the office of the doctor, seizing all kinds of narcotics, patient cards, as well as invoices and the like.

The Government introduced alleged expert testimony to the effect that the vitamin therapy employed by Warren was not, in the expert's opinion, consistent with what he would consider proper treatment.[1]

All of the transactions were in the office of Dr. Warren and there was no clandestine dispensation of drugs (amphetamines) at any time.

---

1. While the expert's opinion that he disagreed with Dr. Warren's vitamin therapy course of treatment might have raised questions to be determined in a malpractice action or before a medical board, what Dr. Warren did, however, was not a criminal violation, we maintain.

I.

THE TRIAL COURT COMMITTED EGREGIOUS ERROR IN FAILING TO SUPPRESS THE SEIZURE OF THE PETITIONER'S DRUGS. THE FEDERAL NARCOTICS AGENTS WHO ARRESTED PETITIONER THE DAY FOLLOWING THE INDICTMENT VIOLATED HIS RIGHTS UNDER THE FOURTH, FIFTH AND SIXTH AMENDMENTS BY TRICKING HIM INTO SIGNING A PREVIOUSLY PREPARED DOCUMENT WHICH AUTOMATICALLY SURRENDERED HIS NARCOTICS PRIVILEGES AND RESULTED IN WARREN'S GIVING AN INCRIMINATING STATEMENT IN THE ABSENCE OF COUNSEL.

THIS OBVIOUSLY PREMEDITATED TACTIC MUST BE SEVERELY CONDEMNED AND THIS COURT OUGHT NOT COUNTENANCE CONVICTIONS PREDICATED UPON SUCH UNFAIR PRACTICES.

Doctor Warren, the Petitioner herein, was born in Eastern Europe and was the victim of Nazi persecution to the point where he had been condemned to death. A person of such a background cannot avoid being traumatized and acquiescent in the presence of federal police authority.

We feel the preceding paragraph is necessary to orient this Court so that it can appreciate the perfidy of the tactics employed by the Narcotics agents in this case.

On January 27, 1971, the day after the indictment, these officers suddenly barged into the offices of Doctor Warren who has earned

degrees of Dental Surgeon, Medical Doctor and Doctor of Medical Dentistry (D.D.S.; M.D.; D.M.D.). He had never before been in conflict with the law.

The Narcotics agents had a warrent authorizing a search and seizure of dangerous drugs and records reflecting the purchase, sale, or other distribution of such dangerous drugs of a depressant or stimulant nature (see search warrant in appendix) (22a).

This warrant did not authorize the officers to seize patient records or all drugs. Moreover, the Petitioner, at the time of indictment was "presumed innocent".

To assure their right to make an indiscriminate and massive seizure, the agents brought with them a prepared form which the Petitioner knew nothing about, called "Voluntary Surrender of Narcotics Privileges". This form recites the following:

> "Voluntary Surrender of Narcotic Privileges After being fully advised of my rights, and understanding that I do not have to surrender my narcotic privileges, I freely execute this document and choose to take the actions described herein.
>
> In view of my alleged failure to comply with the Federal requirements pertaining to narcotic drugs, as an indication of my good faith in desiring to remedy any incorrect or unlawful practices on my part, I hereby voluntarily surrender my narcotic

special tax stamp, unused order forms, and narcotic drugs, as evidence of my agreement to relinquish all narcotic drug privileges. Further, I agree that this document shall be authority for the District Director of Internal Revenue to cancel my registration, and that I agree not to exercise my right to reregister for a period of 1 year.

I waive refund of any payments made by me in connection with my registration and procurement of official narcotic order forms, and understand that I will not be permitted to order, possess, dispense, prescribe, or engage in any other narcotic activities whatever, until such time as I am again properly registered."

Witnesses:

_____	A.P. Warren
(Name)	(Name)
Group Supervisor	_____
Title	(Location)
1/27/71	1/27/71
(Date)	(Date)
s/ Frederick Boff	
(Name)	
Special Agent	
(Title)"	

The arresting officers knew that Warren had an attorney since he told them as much. They never permitted him to discuss the Surrender of Narcotic

Privileges Form with counsel and had him execute it just minutes after the trauma of an arrest in the presence of at least five (5) armed Federal officers who were literally ransacking his office.

If precipitate haste was needed to have this form executed, and we cannot possibly see the reason that it was, certainly the Petitioner, a professional man never before in conflict with the law, should have at least been afforded the opportunity to confer with counsel.

This is not unlike the conduct of Patrolman Bruno in SPANO v. NEW YORK, 360 U.S. 315, 323, which the Court unanimously condemned over a decade ago.

The moment that document was executed, not only did the agents then have the "authority" to seize almost every conceivable drug and drug apparatus, but it precluded the doctor from even writing a prescription. He was just about thrown out of business!

Moreover he in essence was conceding that he had acted illegally since that was the purpose for the existence of the form in the first place. The agents made the casuistic pretense that a sentence was struck out, but the fact remained that the Appellant was surrendering one of the most valuable rights a physician possesses. He couldn't even prescribe cough-medicine if it contained any drug.

A timely motion under the Fourth Amendment and Rule 41(e) of the Federal Rules of Criminal Procedure was made, but the Court eventually denied relief.

Incredibly, the prosecutor, in strenuously arguing in support of the palpably improper actions of the agents and refusing to return the "Voluntary" Surrender of Narcotics Privileges Form, declared that no physician has the right to possess drugs and any one of them may be prosecuted at will or at the whim of the Government -- the hapless doctors being relegated solely to urging a defense that they were acting lawfully. In essence, the Government was arguing the Petitioner was presumed "guilty" until or unless he could prove his innocence! (99a; 110a, 111a).

There is apparently a conflict in interpretation between the circuits on the issue of whether or not self-incriminatory material may be seized without a warrant and without probable cause.

In the case at bar there is no doubt but that the agents could justify the seizure of patient records, invoices, other narcotics and the like, only by virtue of the so-called "Voluntary Surrender of Narcotics" form. The opinion in the Court below indicates that the Second Circuit believes that because Dr. Warren was required to maintain certain records as to the acquisition and disposition of amphetamines pursuant to 21 U.S.C. 360a(d), that consequently the agents were free to seize those items irrespective of proper warrants or of the existence of probable cause.

In HILL v. PHILPOTT, supra, the Seventh Circuit held that business records seized by an Internal Revenue agent could not be used without violation of a defendant's Fifth Amendment rights.

The Court below, however, seeks to distinguish PHILPOTT on the basis that there should be differentiation between personal business items and regular business items, citing UNITED STATES v. KAUFMAN, 429 F.2d 240, 247 (2 Cir.), cert. denied, 400 U.S. 925 (1970) and SHAPIRO v. UNITED STATES, 335 U.S. 1 (1948).

The Second Circuit further declares that even if the seizure had been unlawful, the records could have been introduced to impeach Dr. Warren's testimony, citing HARRIS v. NEW YORK, 401 U.S. 222 (1971), and WALDER v. UNITED STATES, 347 U.S. 62 (1954).

The decision, however, of the Court below, seems to be an attempt to justify gross improprieties on the part of the agents and strives to restore the rule enunciated by Judge Cardozo in PEOPLE v. DEFORE, 242 N.Y. 13, which was overruled in MAPP v. OHIO, 367 U.S. 643 (1961).

This Court denied certiorari in HILL v. PHILPOTT, supra, and reversed the District Court's denial of a motion to supresss.[2]

In HILL, revenue agents seized a large quantity of the records, patients cards, etc., of another medical doctor. In declaring that the search and seizure violated the Fifth Amendment rights of the doctor, despite the fact that the search warrant was in proper form, under the Fourth Amendment, the Court declared that it mattered not whether the evidence was obtained by a valid search warrant or by unlawful seizure -- because if its net effect is to make the victim a witness against himself, the evidence may not be used.

2. The District Court's opinion is sub nom. UNITED STATES v. PREMISES, 801 NORTH SEVENTH STREET (70-1 U.S.T.C. Par. 9412), 310 F. Supp. 1316 (S.D. Ill. 1970).

> "In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search and seizure of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case." GOULD v. UNITED STATES, 255 U.S. 298, 306.

The Seventh Circuit opinion in HILL v. PHILPOTT, supra, added (71 - 1 USTC at 86,518):

> "The Supreme Court has reiterated this principle in subsequent cases, see Agnello v. United States, 269 U.S. 20 (1925) and United States v. Lefkowitz, 285 U.S. 452 (1932), and the same proposition appears implicit in the Court's rationale in both Warden v. Hayden, 387 U.S. 294 (1967) and Schmerber v. California, 384 U.S. 767 (1966)."

The opinion in HILL continues: (id at 86, 518):

> "In recent years this court has zealously guarded the Fifth Amendment rights of citizens confronted with possible penalties or prosecutions for violation of income tax laws. In United States v. United States Coin and Currency in the Amount of $8,674.00 (68-1 USTC §15,837), 393 F.2d 499 (1968), aff'd., April 5, 1971, Supreme Court No. 5 - October Term, 1970, we held that the petitioner there could properly assert his Fifth Amendment

privilege in a forfeiture proceeding brought pursuant to 26 U.S.C. §7302.

In United States v. Dickerson (69-2 USTC §9556), 413 F.2d 111 (1969) we held that the Miranda warnings must be given to a taxpayer under criminal investigation by the Internal Revenue Service at the inception of the first contact with the taxpayer after his case has been transferred to the Intelligence Division of the Internal Revenue Service for possible criminal prosecution. See also, United States v. Lackey (69-2 USTC §9532), 413 F.2d 655 (1969); United States v. Habig (69-2 USTC §9557), 413 F.2d 1108 (1969). We would vitiate the effects of those decisions if we ruled today that the government could avoid all Fifth Amendment considerations by merely obtaining a search warrant."

A

The Search Warrant Was Used in Conjunction With the "Voluntary Surrender" and Is Thus Also Tainted. It Too Violated Appellant's Fifth Amendment Rights.

Since the search warrant and the so-called "Voluntary Surrender of Narcotics Privileges" were used jointly to justify a massive seizure of drugs and patient cards, etc., they must be viewed jointly. The agents did not rely upon the search warrant itself. In any event, since the warrant invaded the Fifth Amendment privilege against self-incrimination, it must be assumed that the evidence is also banned.

Once counsel was notified of the actions of the agents, a prompt motion for suppression and return of the property was made.

In view of the fact that the "Voluntary Surrender" form was executed in the presence of at least five armed officers of the law and in the absence of counsel, while Petitioner was already in "custody" there is a presumption against the waiver of any constitutional rights. A hearing certainly should have been held. (UNITED STATES v. MASIELLO, 2 Cir. Docket No. 34769 434 F.2d 33). In MIRANDA v. ARIZONA, 384 U.S. 436 (1966), the Supreme Court aptly noted (id at 475):

> "This court has always set high standards of proof for the waiver of constitutional rights... and we reassert those standards as applied to in custody interrogations. Since the state is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogations, the burden is rightly on its shoulders."

It is submitted that the Petitioner was indeed interrogated or at least proselytized into signing the infamous "Voluntary Surrender". Thus MIRANDA is clearly applicable and a hearing out of the jury's presence should have been held.

The patient cards at least are a communicative act. The drug inventory and patient records are also. Thus the provisions of the Fifth Amendment were clearly applicable.

In HILL v. PHILPOTT, supra, the Seventh Circuit carefully analyzed the evolution of the present state of the law and the following explanation given by that tribunal is very apropos to the case at bar (id at 86, 517):

> "The Warden decision thus eliminates any distinction as between items which may be considered 'mere evidence' and those which may be 'fruits or instrumentalities of a crime or contraband.' In overruling Gould as to its Fourth Amendment teachings, we do not believe that the Court intended to in any way diminish the Fifth Amendment characteristics which might attach to certain items of property such as personal books and records. Indeed, the Fifth Amendment holding of Gould which concluded that the documents there at issue were protected appears still to be applicable, as that aspect of the case was not mentioned in the Warden opinion.
>
> In the previous term, the Court in Schmerber v. California, 384 U.S. 757 (1966), clearly intimated that in any case where a seizure under the Fourth Amendment also involves Fifth Amendment claims, the first step in considering a motion to suppress is to determine whether the introduction into evidence of the material seized would violate the Fifth Amendment. This is to be determined by inquiry as to whether the evidence 'relates to some communicative act or writing.' If it does, the search is barred under both Amendments."

Thus, the Court below overlooked the fact that the seizure violated the Fifth Amendment as well as the Fourth.

The Petitioner was a licensed medical doctor and had a perfect right to have and keep drugs on his premises. The affidavit for the search warrant therefore, indicating criminal possession of drugs, was not accurate. There was at most a suspicion or premise that the Petitioner was dispensing certain drugs in a manner that was either unconventional or perhaps in violation of the law. The possession of these drugs however could not in any sense of the word be considered illegal. They were purchased through normal distributors and paid for.

There has never been an allegation that the Petitioner was buying drugs illegally on some sort of black market. Thus the search warrant affidavit and warrant itself alleging that the drugs were "concealed" on the premises is inconsistent with the facts. The agents may have testified that the drugs were in boxes labeled something else, but there is no rule that requires the medical doctor who stores drugs legally in his office and examination rooms to have them in a particular place.

The seizure of the drugs therefore was certainly well beyond the scope of the investigation. Moreover, since it occurred <u>after</u> the indictment had already been found, how can it be deemed proper in any sense of the term? The officers would perhaps have had some rational basis to get a search warrant to aid in an investigation to determine if a crime were being committed in aid of a grand jury investigation (provided they

had probable cause, of course). But there certainly was no cogent purpose to be served by getting a search warrant and seizing drugs after the grand jury had completed its investigation and had voted a true bill.

Moreover, if the officers had what they considered sufficient probable cause to seize the drugs, where is there any basis in the warrant or affidavits to justify the seizure of patient cards and records? It is submitted that there was none. To this extent, they certainly exceeded the bounds of their authority.

We must bear in mind that Dr. Warren was an established medical doctor and dentist with a good practice. Why was there any need for a search warrant after the indictment at all? Records could have been obtained from suppliers by subpoena to show that he purchased drugs including amphetamines.

The agents knew that the warrant itself was insufficient, we maintain. That is why they hoodwinked Dr. Warren into signing the "Voluntary" Surrender of his narcotic privileges so that they could then claim that he "consented" to the search and seizure and thus evade responsibility for an arbitrary and unjustified search and seizure. (cf. ZAP v. UNITED STATES, 328 U.S. 624, 628).

The officers were not responding to an emergency. (UNITED STATES v. JEFFERS, 342 U.S. 48, 51, 52; MC DONALD v. UNITED STATES, 335 U.S. 451, 454). They certainly were not in hot

pursuit of a fleeing felon. (WARDEN v. HAYDEN, 387 U.S. 294, 298-9; CHAPMAN v. UNITED STATES, 365 U.S. 610, 615; JOHNSON v. UNITED STATES, 333 U.S. 10). The goods ultimately seized were not in the process of being destroyed. (SCHMERBER v. CALIFORNIA, 384 U.S. 757, 770-771; UNITED STATES v. JEFFERS, supra; MC DONALD v. UNITED STATES, supra, at 455). Nor were they about to be removed from the jurisdiction. (CHAPMAN v. UNITED STATES, supra; JOHNSON, supra, and JEFFERS, supra).

The agents were able to procure a warrant for the seizure of the amphetamine. Why did they not seek one for the other drugs which they also seized at the same time? The obvious answer is that no magistrate would issue such a warrant. Thus the pretext of a "Voluntary Surrender" was employed. The search and seizure therefore included items both covered by a warrant and items not covered by any warrant at all, such as the other drugs and the patient cards.

We cannot fathom the reason the agents sought and obtained Dr. Warren's signature on the "Voluntary Surrender of Narcotic Privileges" except because they, as experienced officers, knew that they really did not have the authority to seize all of the items they actually took and were therefore bent upon ransacking the Petitioner's office under any sort of pretext.

We cannot assume that the items not covered by the warrant were irrelevant or that they did not influence the jurors against Warren. (CHAPMAN v. CALIFORNIA, 386 U.S. 18, 23).

To the extent that property was seized with or without a warrant, we maintain that the violation of the Fifth Amendment precluded the use of the patient cards and records of purchase and inventory which were certainly "testimonial" and thus clearly within the ambit of the privilege against self-incrimination.

B

The Trial Court Not Only Failed to Hold A Hearing Under Rule 41(e) F.R.Crim.P., but Also Gave Such a Confusing and Erroneous Instruction to the Jury Concerning the Evidence Seized, that it Exacerbated the Prejudice.

The Court did not supress this evidence, but instead gave an instruction to the jurors that was so confusing and erroneous that of necessity it had to be extremely prejudicial to the Petitioner.

Thus at pages 455-6 of the trial, the Court told the jury that the items seized after the indictment had been returned, were not to be deemed evidence of the commission of a crime, but rather were to be considered merely to show an "intent" to violate the law!

In another ruling, the Court allowed testimony about barbiturates which are not part of the indictment. The Court told the jury to "disregard" this evidence, (98-99).

That the foregoing instructions to lay jurors in no sense is sufficient to protect the rights of the

accused has long been recognized by this Court as well as the Supreme Court.

Thus, this Court in UNITED STATES v. BOZZA, 2 Cir. 1966, 365 F.2d 206, aptly explained (id at 215):

> "Not even Appellate Judges can be expected to be so naive as really to believe that all twelve jurors succeeded in performing what Judge L. Hand aptly called 'a mental gymnastic which is beyond not only their powers, but anybody else's.' Nash v. United States, 54 F.2d 1006, 1007 (2 Cir. 1932)."
>
> Accord: BRUTON v. UNITED STATES, 391 U.S. 123 (1968).

With respect to that aspect of the search which proceeded without benefit of a search warrant, we call this Court's attention to the recent case of COOLIDGE v. NEW HAMPSHIRE, 29 L.Ed 2d 564, 9 Cr. L. 3208, 3209, decided by the Supreme Court on June 21, 1971. There the Supreme Court explained:

> "The security of one's privacy against arbitrary intrusion by the police--which is at the core of the Fourth Amendment--is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such are enforcible against the States through the Due Process Clause. The knock at the door, whether by day or night, as a prelude to a search, without authority of law, solely on the authority of the police, did not need

the commentary of recent history to be condemned..."

The Supreme Court in COOLIDGE v. NEW HAMPSHIRE, supra, again made it very evident that it was extremely important that the protections of the Fourth Amendment be very liberally construed in favor of the right of privacy. Thus, at 9 Cr. L. 3211, 3212, the Supreme Court declared the following (29 L. Ed. 2d 564):

> "In considering them, we must not lose sight of the fact of the Fourth Amendment's fundamental guarantee. Mr. Justice Bradley's admonition in his opinion for the Court almost a century ago, in Boyd v. United States, 116 U.S. 616, 635, is worth repeating here.
>
> 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices, get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rules that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'"

In COOLIDGE v. NEW HAMPSHIRE, the Supreme Court further explained (9 Cr. L 3215; 29 L.Ed 2d 564).

> "The rationale for the 'plain view' exception is evident if we keep in mind the two distinct constitutional protections served by the warrant requirement. First, the Magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. The premise here is that any intrusion in the way of search and seizure is an evil so that no intrusion at all is justified without a careful prior determination of necessity. (Citing cases).
>
> The second distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a persons' belongings (Citing cases.) The warrant accomplishes this second objective by requiring 'a particular description' of the things to be seized".

The Supreme Court in COOLIDGE v. NEW HAMPSHIRE, further explained the limitations of the "plain view" doctrine. At 9 CR. L 3216, the opinion continues:

> "The limits on the doctrine are implicit in the statement of its rationale. The first of these is that plain view alone is never

> enough to justify the warrant-less seizure of evidence. This is simply a corollary of familiar principal discussed above that no amount of probable cause can justify a warrant-less search or seizure absent 'exigent circumstances'. Incontrovertible testimony of the senses that an incriminating object is on the premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrant-less seizure. Taylor v. United States, 286 U.S. 1; Johnston v. United States, 286 U.S. 1; Johnston v. United States, 333 U.S. 10; McDonald v. United States, 335 U.S. 451; Jones v. United States, 357 U.S. 493, 497, 498; Chapman v. United States, 365 U.S. 610; Trupiano v. United States, 334 U.S. 699." (Emphasis ours.)

The Court went on to explain that where the police suspect that contraband is in the house, they must obtain a search warrant.

The warrant requirement has been a valuable part of our constitutional law for decades and has determined the result in scores and scores of cases in courts all over this country.

> "It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to

> check the well-intentioned but mistakenly over-zealous executive officers who are a part of our system of law enforcement. If it is to be a true guide to constitutional police action, rather than just a pious phrase, then 'the exceptions cannot be enthroned into the rule.'"
>
> United States v. Rabinowitz, supra at 80 (Frankfurter, J. Dissenting).
>
> Coolidge v. New Hampshire, supra, 9 Cr. L. 3220.

These agents thus conducted a needless search and seizure after the indictment. They extended that search and seizure well beyond the limits allowed by the spurious "consent" which they claim was obtained from Dr. Warren when he signed the "Voluntary Surrender" form, supra. This was a distortion of due process; it violated the Fifth Amendment rights of the accused and the Sixth Amendment rights, too, since the surrender form, an important and incriminating document, was executed in the absence of counsel and while Petitioner was in custody.

Both the fruits as well as the evidence itself were suppressable. Without a hearing, who could determine what the fruits were? (NARDONE v. UNITED STATES, supra; WONG SUN v. UNITED STATES, 371 U.S. 471). "Knowledge gained by the government's own wrong cannot be used by it..." (SILVERTHORNE LBR. CO. v. UNITED STATES, 251 U.S. 385 at 392; WONG SUN, supra at 485.) The waters of justice were "polluted".

In MESAROSH v. UNITED STATES, 352 U.S. 1, the Supreme Court ruled (id at 9, 14):

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial . . . This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the Federal Courts. If it has a duty to perform, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity. . . ['T]he untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts... The government of a strong and free nation does not need convictions based upon such testimony'."

For the foregoing reasons alone, a reversal is warranted.

The Circuit Court declared that the issues as to the search and seizure were questions of law and therefore no hearing was necessary. It is respectfully submitted that while questions of law were no doubt involved and were clearly erroneously decided, there were also issues of fact, particularly as to the voluntariness of the execution of the "Voluntary Surrender of Narcotics Privileges" form and thus an evidentiary hearing should have been held.

Warren was not permitted to consult his lawyer with respect to the Surrender of Narcotics Privileges form and, in any event, an evidentiary hearing should have been held as to that.

II.

THE TRIAL JUDGE (MOTLEY, D.J.) IMPOSED SENTENCE ALMOST IMMEDIATELY AFTER VERDICT (WITHIN THREE DAYS). NO PROBATION REPORT HAD BEEN OBTAINED AND THE COURT PRECLUDED COUNSEL FROM ADDRESSING ANY MOTIONS IN ARREST OF JUDGMENT OR IN CONNECTION WITH THE CONVICTION. MOREOVER, IN THE CASE OF A PERSON OF THE PROFESSIONAL BACKGROUND AND ACHIEVEMENTS OF DR. WARREN, IT WAS AN ABUSE OF DISCRETION TO OMIT A PROBATION REPORT.

TO THE EXTENT THAT ANY PUNISHMENT WAS BASED ON ILLEGALLY OBTAINED EVIDENCE, THE SENTENCE WAS IMPROPER.

THE INABILITY TO HAVE HIS MOTIONS CONSIDERED DEPRIVED WARREN OF EQUAL PROTECTION OF THE LAW.

It is indeed difficult to comprehend why the Trial Court was in such precipitate haste to sentence and incarcerate the Petitioner. Members of this Court saw fit to overrule the Court below in denying even bail pending this appeal and granted reasonable bail.

The cases are legion (of which this Court may take judicial notice,) in which even the most

nefarious of felons have been given bail pending an appeal. Yet in the case at bar, the Court below not only refused to consider defense motions which it had agreed to consider originally, but forced sentencing within three days (the Memorial Day weekend intervening, so counsel could do no work), and immediately remanded the Petitioner to jail, despite his age (65) and the history of suffering he has endured (he was sentenced to death by the Nazis and how he survived is a drama of suffering fit for Dante in itself).

No probation report was obtained. The Court really knew very little about the Petitioner's background and was unconcerned with the need on his part to arrange other treatment for patients or to wind up his practice.

While Rule 32 of the Federal Rules of Criminal Procedure requires a probation report, it is permissible for a Court to dispense with it when it feels that it cannot make any difference. Yet, if the sentence was based upon misinformation or even illegally obtained evidence, this Court would have the right to review those facts since it would amount to a deprivation of due process (UNITED STATES v. MALCOLM, 2 Cir. 1971, ___ F.2d ___ (decided June 1971); VERDUGO v. UNITED STATES, 9 Cir. 1968, 402 F.2d 599. See, Note, "Procedural Due Process at Judicial Sentencing for Felony", 1968, 81 Harv. L.

Apparently, the Judge below was assuming that because the sentence is technically within the range permitted by law, that she has "carte blanche" to sentence without the slightest regard to what a

pre-sentence report might disclose. To say that the loss of a substantial income; disbarment from practicing medicine and dentistry; and the obloquy and disgrace to the Petitioner and his family, to say nothing of his relatively advanced age (65), was apparently not considered, would be in the realm of conjecture but, nonetheless, it seems to be an unconscionably harsh punishment to mete out in this kind of case.

Circuit courts have judicial supervision over the conduct of lower federal courts (GODFREY v. UNITED STATES, 358 F.2d 850, (D.C. Cir. 1966); ROSS v. UNITED STATES, 349 F.2d 210 (D.C. Cir. 1965); UNITED STATES v. SANCHEZ, 361 F.2d 824, (2 Cir. 1966)).

Although we believe the sentencing herein rises to an issue of Due Process (UNITED STATES v. MALCOLM, supra), at least under its supervisory power, this Court should make it unmistakable to all District Judges that Rule 32 may not be ignored at the whim of a sentencing judge, but that there is a need to consider pre-sentencing reports and to try to harmonize sentencing standards, so that we don't find the frequent anomaly of one judge meting out a six-month sentence and another, under almost identical circumstances, imposing five years and a fine. This merely confuses, enrages and embitters the accused--it certainly does nothing to rehabilitate him. It is suggested most respectfully that the function of sentence is primarily to rehabilitate and not merely to punish without thought of reformation or rehabilitation.

The Court below considered this point Petitioner's most substantial contention. The Circuit Court declared, inter alia, as follows:

> "It is theoretically possible, and courts have discussed an abuse of discretion in the decision to proceed without a report, but none has yet disturbed a sentence on these grounds. Some circuits are evidently uneasy about the problem, however, and justify the lack of report because all the necessary information had been made available in some other manner or because the sentence was lenient. See Viramontes-Medina v. United States, 411 F.2d 981 (9 Cir. 1969); King v. United States, 410 F.2d 1127 (9 Cir. 1969); United States v. Hutul, 416 F.2d 607 (7 Cir. 1969), cert. denied, 396 U.S. 1012, 90 S.Ct. 573, 24 L.Ed.2d 504 (1970); but see United States v. Teague, 445 F.2d 114 (7 Cir. 1971)."

The Court of Appeals failed to realize that Dr. Warren had to file a notice of appeal when sentence was imposed because Judge Motley immediately incarcerated him without bail. It was, therefore, necessary to apply to the Circuit Court for release pending appeal and, in order to do so, a notice of appeal was essential. District Judge Motley then denied the equal protection of the laws to Petitioner by refusing to permit him to file motions addressed to the conviction or in arrest of judgment because he had filed a notice of appeal. This was a grossly unfair dilemma in which to place Dr. Warren. The Court of Appeals completely failed to recognize this dilemma when it noted that the District Court was deprived of

jurisdiction by the filing of the notice of appeal. Thus, a hapless defendant can be effectively deprived of equal protection of the laws and due process by incarcerating him immediately, as was done in the case at bar.

III.

THE CONVICTION HERE SHOULD HAVE BEEN DENOMINATED A MISDEMEANOR RATHER THAN A FELONY.

The Court below declared that the offense committed under 21 U.S.C. 331(q)(2) has been transferred to Section 841(a)(1). It is the position of the Petitioner herein that the section under which the indictment was drawn provides for misdemeanor punishment and that was the law at the time of sentence. It is submitted that a misdemeanor at most is what Petitioner should have been punished for.

Conclusion

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX A

Opinion of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 207 - September Term, 1971

(Argued October 8, 1971 Decided January 5, 1972)

Docket No. 71-1545

- -x

UNITED STATES OF AMERICA,

Appellee,

v.

ALOIS PETER WARREN,

Appellant.

- -x

Before: WATERMAN and SMITH, Circuit Judges, and ZAMPANO,* District Judge.

Appeal from judgment of conviction and sentence on trial to the jury in the United States District Court for the Southern District of New York, Constance Baker Motley, Judge, for violation of 21 U.S.C. §§321, 331(q)(2), 333 and 360a (b) (Supp. V 1969) relating to dangerous drugs. Affirmed.

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* United States District Judge for the District of Connecticut, sitting by designation.

Opinion of the Court Below

IRVING ANOLIK, New York, N.Y. (Sidney O. Raphael, Raphael, Searles & Vischi, New York, N.Y., of counsel), for Appellant.

WALTER J. HIGGINS, JR., Asst. U.S. Attorney (Whitney North Seymour, Jr., U.S. Attorney for the Southern District of New York, of counsel), for Appellee.

SMITH, Circuit Judge:

Dr. A. Peter Warren appeals from a judgment of the United States District Court for the Southern District of New York (Constance Baker Motley, Judge), convicting him after an eight day jury trial on one count of conspiring to violate the federal food and drug laws relating to stimulant or depressant drugs and of four counts of selling, delivering, and disposing of amphetamine sulphate in violation of 21 U.S.C. §§321, 331(q)(2), 333 and 360a(b) (Supp. V 1969). Dr. Warren was sentenced to five years imprisonment on each count, to run concurrently, and was fined $10,000. On appeal he claims that the district court erred in numerous respects in the conduct of the trial. We find no error which warrants disturbing the verdict, and we affirm.

At the time of the events charged in the indictment, Dr. Warren was a duly licensed physician practicing in New York City. As a practitioner licensed by law to prescribe or administer depressant or stimulant drugs while acting in the course of his professional practice, Dr. Warren

was exempt from the statutory prohibition against selling or disposing of amphetamines as long as he was acting "in the ordinary and authorized course of his business [or] profession. . ." 21 U.S.C. §360a(b) (Supp. V 1969). The government attempted to prove at trial that the sales alleged in the indictment had no medical basis and were economically motivated retail sales rather than treatments given in the course of a physician-patient relationship.

The government established its case through the testimony of several special agents of the Bureau of Narcotics and Dangerous Drugs. Richard Dreiwitz, an agent acting in an undercover capacity, was introduced to Dr. Warren at his office in November, 1970 by another patient of the doctor's. Dreiwitz mentioned that he needed a two week supply of good quality methamphetamine; without conducting a medical examination, Dr. Warren gave the agent two vials, which subsequent analysis revealed contained 30 cc of amphetamine sulphate each, and instructions on use.[1] Dreiwitz was to inject himself daily with a mixture of 2 cc's of the "meth," a vitamin solution and "PW-7." This last ingredient is procaine hydrochloride, a mild anesthetic.

Two weeks later, Dreiwitz bought another 60

1. Dr. Warren testified that he took Dreiwitz' pulse and that the agent told him that he had recently been examined by another doctor, who had found him perfectly healthy. The agent denied that there had been any examination or conversation on that point. The jury was entitled to disbelieve the doctor.

cc of amphetamines from Dr. Warren's assistant.[2] On his third visit, Dreiwitz told the doctor that he didn't need the vitamins, as he only took the drug to help his performance (he was allegedly a musician). He requested enough amphetamine for four people for two weeks, claiming that some of his friends, whom Warren had never seen, wanted the injections too. He paid $900 for six 30 cc vials.

Less than a week later Dreiwitz, having arranged to record the subsequent conversation, telephoned Dr. Warren. Dreiwitz and the doctor negotiated a large sale of drugs; Dr. Warren agreed to give them to a friend of the agent's, who was to come to the doctor's office. Agent Robert Brown subsequently picked up six 30 cc vials. Thus, in a twenty day period, Dr. Warren sold Dreiwitz enough amphetamine sulphate for 240 injections.

Dr. Warren was indicted on January 26, 1971. He was arrested the next day, and his office was searched pursuant to a warrant. The search uncovered over one hundred 30 cc vials of unlabeled or mislabeled amphetamine sulphate. The doctor was brought to trial in May, 1971. The government's witnesses included a musician who had been misinformed by Dr. Warren about the content of the injections and who had, after several months of "treatment," been hospitalized for psychiatric reasons. Another patient, who had apparently become addicted to the injections, had

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2. The assistant was indicted on two counts of conspiring and of sales. Her trial was severed from that of Dr. Warren.

never been told what sort of drug he had been receiving. An expert witness for the government testified that providing amphetamine to people who had not been medically examined, much less seen, went beyond any physician's proper relationship with a patient. This is particularly true when, as here, the drug was given for self-injection, a technique susceptible of abuse.

Warren claimed that he was entrapped and that he never sold amphetamine other than "in the course of [his] professional practice." He claimed that medical examinations were always done on patients and that Dreiwitz had assured him that he had recently seen another doctor. The defendant's expert witness testified that there were some approved medical uses for amphetamine; he agreed with the government's witness that a physical examination is a prerequisite to its use and that the drug ought not be dispensed for self-administration. Both expert witnesses agreed that there was as of now no medically approved reason for long-term treatment with amphetamines.

The jury found Warren guilty on all counts. Appellant contends on appeal that he was deprived of his constitutional rights by numerous rulings of the trial court. He claims that the search and seizure of his drugs and patient records was illegal and that it was tainted by an incriminating form he was pressured to sign during the search; that a hearing ought to have been held on the admissibility of the tape recording of his conversation with Agent Dreiwitz; and that the court erred in admitting certain other evidence.

He urges that the court committed error in sentencing him without a pre-sentence report and in refusing to pass on his post-trial motions. Last, he maintains that his guilt was not proved beyond a reasonable doubt. None of these claims is meritorious.

Warren claims that the search of his office and seizure of drugs and patient cards or records violated his Fourth and Fifth Amendment rights. The search was conducted pursuant to a warrant issued on the basis of a detailed affidavit from the agent who had retrieved Dreiwitz' drug order from Dr. Warren. The facts stated therein clearly constituted probable cause. The warrant named dangerous drugs and records of the purchase, sale, or other distribution of such drugs as the objects to be seized. Appellant claims that the agents rummaged through his office; the thoroughness of the search was necessitated by the discovery of numerous vials of amphetamine sulphate in boxes labeled "perfume" or "shaving lotion" stored in closets and drawers in the office and adjoining dark room. The agents did not go beyond the terms of the warrant, and their search did not violate the Fourth Amendment.

Warren claims that his Fifth Amendment rights were violated because the records seized were testimonial in nature. The records consisted of index cards with patient names and notations of the number of injections given, the dates and charges for them. They contained no other medical information. Hill v. Philpott, 445 F.2d 144 (7 Cir. 1971), held that business records

seized by an Internal Revenue agent could not be used without violation of the defendant's Fifth Amendment rights. In that case, however, the records were personal business items; in this case, Dr. Warren was required under 21 U.S.C. §360a(d) to make and keep records on acquisition and disposition of amphetamine. Such records, part of a regulatory scheme with public purposes, are not protected by the Fifth Amendment and are specifically excluded from the holding in Hill. 445 F.2d at 146. United States v. Kaufman, 429 F.2d 240, 247 (2d Cir.), cert. denied, 400 U.S. 925 (1970); Shapiro v. United States, 335 U.S. 1 (1948). In any case, the records were used only to impeach Dr. Warren's testimony that he had dispensed amphetamine to only a small percentage of his patients. Under Harris v. New York, 401 U.S. 222 (1971), citing Walder v. United States, 347 U.S. 62 (1954), this would have been proper even were the records improperly obtained.

Warren also claims that the court below committed error in not holding a hearing on the legality of the search and seizure. Judge Motley heard argument on the motion to suppress at a pretrial hearing and conference, and she wrote a memorandum opinion supporting her decision to deny the motion. Her decision that the issue did not warrant another hearing is within her discretion. United States v. Suarez, 380 F.2d 713 (2d Cir. 1967); United States v. Culotta, 413 F.2d 1343 (2d Cir.), cert. denied, 396 U.S. 1019 (1969). If the facts alleged, assuming they could be proven, would have justified granting the motion, then a hearing would have been more essential. Here the

question was one of law, and the court treated it fully.

Appellant also argues that even if the search was otherwise valid, it was tainted by a "Voluntary Surrender of Narcotics Privileges" form which he signed in his office when the agents arrested him. The signer of the form consents to the government's seizure of narcotic drugs then in his possession and surrenders the right to dispense such drugs. The form states that the signer acts voluntarily, after being apprised of his rights, in an effort to show good faith in remedying an alleged failure to comply with federal laws on narcotic drugs. Warren claims that he was not advised of his rights before signing and that therefore the "confession" was coerced. The form is claimed to have prejudiced him in this trial because it gave the agents the right to do a broader search than was authorized by the search warrant.

This argument contains several flaws. First, there was testimony that Warren was given the opportunity to call a lawyer. Second, before signing the form he crossed out the only incriminating paragraph on the page. The issue of coercion was not decided by the court below, however, because the form was not used in this trial and is irrelevant to it. The form covered only narcotic drugs, not amphetamines, and Warren was not prosecuted for any narcotics violation.[3]

3. The only reference to it during the whole course of the trial was a result of questions by defense counsel quite obviously aimed at eliciting mention of the document from a government agent.

Nor did Warren present any evidence that "fruits" of the form had been used in any way at the trial. If the government's actions were unwise and even improper, a civil action to recover the right to register is the appropriate method of redressing the wrong. In re Wiltron Assoc., 49 F.R.D. 190 (1970).

Dr. Warren claims that a hearing ought to have been held on the admissibility of the tape recording of his telephone conversation with Agent Dreiwitz, during which the two discussed a sale of amphetamines. Dr. Warren errs in claiming that this issue was not aired, as it was discussed at length at a pretrial hearing in May, 1971. The court held that if she found the tape audible, it would be admitted; it was made with the consent of one party to the conversation and was therefore admissible. United States v. White, 401 U.S. 745 (1970). The court below found it audible, and we concur in that judgment.

Warren's most substantial contention is that the court abused its discretion in sentencing him to five years imprisonment, the maximum on each count, without awaiting a pre-sentence report. Under Rule 32(c), Fed. R. Crim. P., a pre-sentence report is to be prepared "unless the court otherwise directs." The judge has been held to have discretion to dispense with the report if he feels it will not affect the disposition. United States v. Visconti, 261 F.2d 215 (2d Cir. 1958); United States v. Schwenke, 221 F.2d 356 (2d Cir. 1955). In this case Judge Motley sentenced Dr. Warren several days after the judgment was entered, and

she did not wait for a report. This is somewhat troublesome, because this court has stressed the importance of the district court having unfettered access to any relevant information about the defendant, and information can be used in the presentence report which would be beyond the permissible scope at trial. United States v. Schipani, 435 F.2d 26 (2d Cir.), cert. denied, 401 U.S. 983 (1970).

It is theoretically possible, and courts have discussed an abuse of discretion in the decision to proceed without a report, but none has yet disturbed a sentence on these grounds. Some circuits are evidently uneasy about the problem, however, and justify the lack of report because all the necessary information had been made available in some other manner or because the sentence was lenient. See Viramontes-Medina v. United States, 411 F.2d 981 (9 Cir. 1969); King v. United States, 410 F.2d 1127 (9 Cir. 1969); United States v. Hutul, 416 F.2d 607 (7 Cir. 1969), cert. denied, 396 U.S. 1012, 90 S. Ct. 573, 24 L.Ed.2d 504 (1970); but see United States v. Teague, 445 F.2d 114 (7 Cir. 1971).

In this case, Judge Motley announced her intention of proceeding without the report by stating that "it should be timely settled. . . [so] the doctor can then know what steps to take further and get this matter finally concluded." While such a justification might exist in almost every case, it is also true that the appellant did not object to this plan. The record also shows that appellant had testified at some length about his

practice; the fact that he had no prior record had been noted. The court felt that the offense, involving serious danger to the physical and mental health of many hundreds of unsuspecting people, was a particularly callous example of the increasingly severe problem of drug abuse. We find her action justified in this instance, therefore.

It would be wise, however, for trial judges, in those rare cases in which they dispense with the pre-sentence report, to state on the record the reasons for failing to make use of a tool which has proven helpful in individualizing and thus improving the sentencing process. Such a requirement will provoke thought about the decision to bypass this potentially valuable step in the criminal process.

Appellant complains of the treatment accorded his defenses by the court and jury. He claims that his guilt was not established beyond a reasonable doubt because it was not conclusively shown that the sales were made outside the course of his professional practice. Though he concedes that his behavior may have been ill-advised and even incompetent under medical standards, he claims that it did not violate the law. The judge instructed the jury clearly and correctly on the relevant standard. Congress did not intend by its exception to the statutory prohibition to allow doctors to go into the retail dangerous drug business. White v. United States, 399 F.2d 813, 817 (8 Cir. 1968). The evidence was sufficient to allow the jury to conclude that the appellant was violating the law.

Dr. Warren's other defense was that he was entrapped by the agents. The judge charged the jury correctly on this issue, stating that if the defendant showed government initiation of the crime with some evidence, then the government had to show his propensity to commit it beyond a reasonable doubt. The issue is for the jury, and the testimony of the agents and the quantity of drugs found in Dr. Warren's office gave them ample basis for rejecting the defense. See United States v. Braver and Lehrer, No. 1031 (2d Cir. Oct. 28, 1971); United States v. Leighton, 386 F.2d 822 (2d Cir. 1967), cert. denied, 390 U.S. 1025(1968).

Appellant argues that the trial court erred in not passing on his motions for a new trial and for judgment notwithstanding the verdict. He was sentenced on June 2, 1971, and filed a notice of appeal a few days thereafter. On July 8, 1971, he moved for a new trial. Once a notice of appeal has been filed, the district court is deprived of jurisdiction to act on the motions. United States v. Brown, 335 F.2d 170 (2d Cir. 1965); United States v. Ellenbogen, 390 F.2d 537 (2d Cir.), cert. denied, 393 U.S. 918 (1969), reh. denied, 399 U.S. 917 (1970).

Miscellaneous rulings of the trial court disturb appellant. One such ruling was that in which the court permitted the introduction of evidence obtained in a search conducted a day after the filing of the indictment. The indictment alleged a conspiracy running from September 1, 1970 to January 26, 1971, the date the indictment was returned. Warren claimed that drugs seized the day after

the conspiracy allegedly terminated were irrelevant and prejudicial. Judge Motley held that this evidence, tending to show acts similar to those charged in the indictment, was admissible to show intent to violate the law and to negate the defense of entrapment raised by appellant. The rule as to such evidence of prior similar acts, as it has been framed in this circuit, allows its admission for all purposes except to show the criminal character or disposition of the defendant. See, e.g., United States v. Knohl, 379 F.2d 427 (2d Cir. 1967); United States v. Deaton, 381 F.2d 114 (2d Cir. 1967). The court properly admitted the evidence and instructed the jury on its use.

Defense counsel asked Judge Motley to postpone the trial for several months so that all of Warren's counsel could be present. In light of this court's recent promulgation of rules on speedy disposition of criminal cases and the heavy backlog under which the courts suffer, the court's decision was proper; defense counsel themselves conceded this to be true.

The court refused to instruct on "two inferences," that is, that if the circumstantial evidence is susceptible of two inferences, one pointing to guilt and the other to innocence, the defendant must be acquitted. Under Holland v. United States, 348 U.S. 121 (1954), and numerous cases following it, this charge is not required. The instructions on reasonable doubt were proper.

The last of appellant's myriad claims is that he ought to have been sentenced under the new

drug control law, passed in October, 1970, to go into effect on May 1, 1971. However, Warren's claim that under the new law the maximum sentence he could have received is one year is erroneous. The offense he committed, under then-existing 21 U.S.C. §331(q)(2) has now been transferred to section 841(a)(1), for which the maximum penalty is a sentence of five years and a fine of $15,000, $5,000 more than the limit under which Warren was held. A saving clause in the new law made it inapplicable in this case.

Judgment affirmed.

U.S.A. v. WARREN

No. 71-1545

Dec. 29, 1971

s/ (illegible)

U.S.A. v. WARREN

No. 71-1545

12/23/71

I concur.

RC 2

APPENDIX B
Order of Affirmance

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of January one thousand nine hundred and seventy-two.

Present:

HON. STERRY R. WATERMAN,
J. JOSEPH SMITH
Circuit Judges.
ROBERT ZAMPANO,
District Judge.

UNITED STATES OF AMERICA,

Appellee,

v.

ALOIS PETER WARREN,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Order of Affirmance

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

APPENDIX C

Order on Rehearing

71-1545

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -x

United States of America,

Plaintiff-Appellee,

v.

Alois Peter Warren,

Defendant-Appellant.

- -x

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition for rehearing be and it hereby is DENIED; the issuance of the mandate is stayed pending application for a writ of certiorari to the Supreme Court of the United

Order on Rehearing

States, subject to the provisions of Rule 41(b) Federal Rules of Appellate Procedure.

Sterry R. Waterman
(per JJS)

J. Joseph Smith
Circuit Judges

Robert S. Zampano,
District Judge

February 8, 1972

SUPREME COURT, U. S.
FILED
APR 28 1972

No. 71-1151

In the Supreme Court of the United States

OCTOBER TERM, 1971

ALOIS PETER WARREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.